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# Bar Malaysia v Ketua Pengarah Hasil Dalam Negeri

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMON NO WA-24–12–03 OF 2017
KAMALUDIN MD SAID J
2 APRIL 2018

C

*Legal Profession — Legal professional privilege — Client legal privilege — Whether legal professional privilege under s 126 of the Evidence Act 1950 overridden by s 142(5) of the Income Tax Act 1967*

D

E

*Statutory Interpretation — Construction of statutes — Conflicting statutes — Generalia specialibus non derogant — Special provisions regarding privilege — Whether should prevail over conflicting earlier general provisions regarding privilege — Whether s 126 specific provision — Whether s 142(5)(b) include operation of common law — Whether legal professional privilege under s 126 of the Evidence Act 1950 overridden by s 142(5) of the Income Tax Act 1967 — Evidence Act 1950 s 126 — Income Tax Act 1967 s 142(5)*

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This was an application by the plaintiff against the defendant seeking several reliefs that was declarations regarding solicitor-client privilege. The plaintiff had written in to the defendant stating that the plaintiff had received complaints from members of Malaysian Bar that officers of the defendant had been carrying out raids on the plaintiff's member's law firms to conduct audit of their client's account and insisting to have sight of the relevant accounting books and records. The plaintiff claimed that such audit breached the principle of solicitor-client privilege provided under the provisions of Chapter IX of Part III, Evidence Act 1950 ('the EA') and the Legal Profession Act 1976 ('the LPA') and also s 142(5) of the Income Tax Act 1967 ('the ITA') did not prevail over the solicitor-client privilege. The defendant had replied to the plaintiff stating that the defendant was under a duty to conduct audit to ensure that the tax assessment made was in accordance with the provision of the ITA. The defendant claimed that s 142(5) of the ITA overrode provisions of the EA and the LPA and hence did not breach the principle of solicitor-client privilege. The issue for the court to determine was whether s 142(5) of the ITA overrode s 126 of the EA.

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**Held**, allowing the plaintiff's application with costs of RM5,000:

(1) Section 142(5)(b) of the ITA did not go beyond the provision of s 126 of the EA. Only para (b) of s 142(5) of the ITA excluded or overrode privilege conferred in other written law. In other words, s 126 of the EA which lay within Chapter IX Part III of the EA was saved and not caught

under s 142(5) of the ITA. Therefore, s 142(5)(b) of the ITA could not be used by the defendant as an excuse to be given access to the clients' account with a view to taxing the advocates and solicitors (see paras 11, 14–15 & 26).

(2) The words 'notwithstanding the provisions of any other written law' in s 142(5)(b) of the ITA did not exclude the operation of common law. The Parliament did not intend to apply s 142(5)(b) of the ITA to the exclusion of the common law on legal privilege and that provision could not be given effect to the extent beyond the Parliament's intention. At most, the provision may only apply to the possible secondary cases (see paras 27 & 33).

(3) Based on the clear and express language in s 126 of the EA, it could not be disputed that the EA was the specific statute which governed matters pertaining to legal privilege. Although the provision was enacted before s 142(5) of the ITA, it was a specific provision on legal privilege, and as such excluded the operation of the general provision of s 142(5) of the ITA to the extent of any inconsistency. Since the EA was undeniably more precise, unambiguous and specific, s 126 of the EA must take precedence over s 142(5)(b) of the ITA to the extent of any inconsistency in respect of matters relating to legal privilege (see paras 34 & 40).

(4) Although para (b) of s 142(5) of the ITA did not protect privilege communication or documents in other written law, the solicitor-clients privilege under s 126 of the EA was not affected by the operation of the ITA. Before the defendant was required to view the clients' account there must some information of an illegal act/purpose and/or any crime of fraud or reasonable belief that the plaintiff had used the clients' account as a means to park the law firm's own incomes which resulted to an understatement of income by the respective law firm which warrant an investigation (see paras 52 & 55).

**[Bahasa Malaysia summary**

Ini adalah permohonan oleh plaintif terhadap defendan bagi mendapatkan beberapa relif yang merupakan perisytiharan mengenai keistimewaan peguamcara-klien. Plaintif telah menulis kepada defendan menyatakan bahawa plaintif telah menerima aduan daripada ahli-ahli Bar Malaysia yang mana pegawai-pegawai defendan telah melakukan serbuan ke atas firma undang-undang ahli-ahli plaintif untuk menjalankan audit akaun pelanggan mereka dan menegaskan untuk melihat buku dan rekod perakaunan yang berkaitan. Plaintif mendakwa bahawa audit itu melanggar prinsip keistimewaan peguamcara-klien yang tersedia dibawah peruntukan Bab IX Bahagian III, Akta Keterangan 1950 ('AK') dan Akta Profesion Undang-Undang 1976 ('APU') dan s 142(5) Akta Cukai Pendapatan 1967 ('ACP') juga tidak mengatasi keistimewaan peguamcara-anakguam. Pihak

defendan telah menjawab kepada pihak plaintif menyatakan bahawa pihak defendan berada dalam kewajipan untuk melakukan audit untuk memastikan penilaian cukai dilakukan mengikut peruntukan ACP. Pihak defendan mendakwa bahawa s 142(5) ACP mengatasi peruntukan AK dan APU dan oleh itu tidak melanggar prinsip keistimewaan peguamcara-anakguam. Isu yang perlu diputuskan mahkamah adalah sama ada s 142(5) ACP mengatasi s 126 AK.

**Diputuskan**, membenarkan permohonan plaintif dengan kos RM5,000:

(1) Seksyen 142(5)(b) ACP tidak melampaui peruntukan s 126 AK. Hanya perenggan (b) s 142(5) ACP dikecualikan atau mengatasi keistimewaan yang diberikan dalam undang-undang bertulis yang lain. Dalam erti kata lain, s 126 AK yang terletak didalam Bab IX Bahagian III AK adalah diselamatkan dan tidak tertangkap dibawah s 142(5) ACP. Oleh itu, s 142(5)(b) ACP tidak boleh digunakan oleh pihak defendan sebagai alasan untuk diberikan akses kepada akaun klien dengan tujuan untuk mengenakan cukai terhadap peguambela dan peguamcara (lihat perenggan 11, 14–15 & 26).

(2) Perkataan 'notwithstanding the provisions of any other written law' dalam s 142(5) ACP tidak mengecualikan operasi undang-undang am. Parlimen tidak berhasrat untuk menerapkan s 142(5) ACP untuk mengecualikan undang-undang am mengenai keistimewaan undang-undang dan peruntukan tersebut tidak boleh dilaksanakan melebihi niat Parlimen. Paling banyak, peruntukan ini hanya boleh digunakan untuk kemungkinan kes-kes sekunder (lihat perenggan 27 & 33).

(3) Berdasarkan bahasa yang jelas dan nyata dalam s 126 AK, adalah tidak boleh dipertikaikan bahawa AK adalah undang-undang khusus yang mentadbir perkara berkaitan keistimewaan undang-undang. Walaupun peruntukan tersebut digubal sebelum s 142(5) ACP, ia merupakan peruntukan khusus tentang keistimewaan undang-undang, dan oleh itu dikecualikan dari operasi peruntukan am s 142(5) ACP setakat mana berlaku ketidakselarasan. Oleh kerana AK tidak dapat dinafikan lebih tepat, jelas dan nyata, s 126 AK harus diutamakan dari s 142(5) ACP apabila berlaku ketidakselarasan berkenaan keistimewaan undang-undang (lihat perenggan 34 & 40).

(4) Walaupun perenggan (b) s 142(5) ACP tidak memelihara keistimewaan perhubungan atau dokumen dalam undang-undang bertulis yang lain, keistimewaan peguamcara-klien dibawah s 125 AK adalah tidak dipengaruhi oleh operasi ACP. Sebelum defendan dikehendaki untuk melihat akaun klien mestilah terdapat beberapa maklumat tentang tindakan/tujuan haram dan/atau sebarang jenayah penipuan atau kepercayaan munasabah bahawa plaintif telah menggunakan akaun klien

sebagai cara untuk meletakkan pendapatan firma guaman sendiri yang mengakibatkan penyataan pendapatan tidak benar dari firma guaman tersebut yang mana memerlukan penyiasatan (lihat perenggan 52 & 55).]

**Notes**

For a case on client legal privilege, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) para 1718.

For cases on conflicting statutes, see 11(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1921–1927.

**Cases referred to**

*AG Varadarajulu & Anr vs The State Of Tamil Nadu & Ors* (1998) 4 SCC 231, SC (refd)

*All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97; [2006] 5 AMR 585, FC (refd)

*Arthur v Bokesham* 11 Mod 150 (refd)

*Blunden v Commonwealth of Australia* [2003] HCA 73, HC (folld)

*British Railways Board v Pickin* [1974] AC 765, HL (refd)

*Choong Yik Son v Majlis Peguam Malaysia* [2008] 7 MLJ 215, HC (refd)

*Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191, CA (folld)

*Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257, FC (folld)

*Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 MLJ 14, FC (refd)

*Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600, SC (refd)

*DP Vijandran v Majlis Peguam* [1995] 3 MLJ 576, CA (refd)

*Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35, SC (refd)

*Funk David Paul v Asia General Asset Bhd* [2014] 1 MLJ 681, CA (refd)

*Gideon Tan v Tey Por Yee and another appeal* [2017] 1 MLJ 352, CA (refd)

*Gurbachan Singh v Public Prosecutor* [1967] 2 MLJ 220, FC (refd)

*Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener)* [2015] 4 MLJ 166, FC (refd)

*Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 MLJ 513, FC (refd)

*Ketua Pengarah Hasil Dalam Negeri v Malaysian Bar* [2006] 5 CLJ 217 (refd)

*Koh Siew Keng (P) & Anor v Koh Heng Jin* [2008] 3 MLJ 822, CA (refd)

*Lee Lee Cheng (F) v Seow Peng Kwang* [1960] 1 MLJ 1, CA (refd)

*Malaysian Newsprint Industries Sdn Bhd v Bechtel International Inc & Anor* [2013] MLJU 866; [2014] 3 CLJ 367, HC (refd)

*Manilal & Sons (M) Sdn Bhd v M Majumder* [1988] 2 MLJ 305, SC (folld)

*Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21, FC (refd)

*Mohindar Singh and another v Rex* [1950] 1 MLJ 97, PC (refd)

A *Positive Vision Labuan Ltd v Ketua Pengarah Hasil Dalam Negeri and other appeals* [2017] 2 MLJ 421, FC (refd)
*Protasco Bhd v PT Anglo Slavic Utama & Ors* [2016] 7 MLJ 523, HC (refd)
*SR Batliboi and Co v Department of Income Tax (investigation)* LNIND 2009 DEL 689, HC (refd)
B *Smt Geeta And Ors vs The State Of UP And Anr* 2010 SC 1218, SC (refd)
*Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2007] 6 MLJ 581, FC (refd)
*Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707, CA (refd)
C *Walsh v Alexander* [1913] 16 CLR 293, HC (folld)
*Yeo Hock Cheng v Rex* [1938] 1 MLJ 104 (folld)

**Legislation referred to**

D Evidence Act 1950 ss 126, 127, 128, 129, Chapter IX, Part III
Federal Constitution art 160(2)
Income Tax Act 1967 ss 80, 80(1), 116(a), 142, 142(5), (5)(b), Part V
Interpretation Acts 1948 and 1967 s 3
Legal Profession Act 1976

E *Anand Raj (Foong Pui Chi with him) (Shearn Delamore & Co) for the plaintiff.*
*Ahmad Ishak bin Mohd Hassan (Ruzaidah bt Yaacob with him) for the defendant.*

**Kamaludin Md Said J:**

F INTRODUCTION

**[1]** The plaintiff filed an originating summon ('OS') dated 7 March 2017 against the defendant seeking the following relief:

G (a) a declaration that s 142(5) of the Income Tax Act 1967 ('the ITA') does not entitle or empower the defendant to disregard the privilege under Malaysian Law that protects all communications, books, objects, articles, materials, documents, things, matters or information passing between an advocate and solicitor and his/her client or advice given by an advocate
H and solicitor to his/her client, whether contained in any book, statement, account or other record of any description whatsoever ('client communications'), and which privilege is referred to variously under Malaysian law as 'legal privilege ('privilege') by requesting or demanding access to, or disclosure of, such client communications from any advocate
I and solicitor, unless privilege is waived by the client;

(b) a declaration that Part V of the ITA generally, and s 80 of the ITA in particular, do nor entitle or empower the defendant to disregard the privilege that protects all client communications by requesting or demanding access to, or disclosure of, any such client communications

from any advocate and solicitor, unless privilege is waived by the client; and

(c) a declaration that privilege under Malaysian law generally, and as referred to in ss 126–129 of the Evidence Act 1950 in particular, require and advocate and solicitor to reject any request or demand of the defendant for access to, or disclosure of, any, client communications, unless privilege is waived by the client.

**[2]** Both parties have duly filed the following cause papers:

(a) originating summons dated 7 March 2017;

(b) affidavit in support affirmed by Karen Cheah Yee Lyn on 7 March 201;

(c) affidavit in reply affirmed by Hazlina bt Hussain on 28 April 2017;

(d) affidavit in reply affirmed by Karen Cheah Yee Lyn on 26 May 2017; and

(e) affidavit in reply affirmed by Chan Weng Keng on 29 May 2017.

**[3]** Both parties have filed their respective written submissions. The plaintiff's OS was heard on 16 January 2018 and the decision was adjourned to 29 March 2018 and subsequently on 2 April 2018.

BRIEF FACTS

**[4]** The plaintiff had written in to the defendant on 3 November 2016 to state that:

(a) the plaintiff had received complaints from members of Malaysian Bar that officers of the defendant have been carrying out raids on the plaintiff's member's law firms to conduct audit of their client's account and insisting to have sight of the relevant accounting books and records;

(b) the plaintiff's has taken a stance that such audit breaches the principle of solicitor-client privilege;

(c) s 142(5) of the Income Tax Act 1967 should not and does not prevail over the solicitor-client privilege.

**[5]** The plaintiff has also on 29 November 2016 wrote in to the defendant as a follow up reminder to his letter dated 3 November 2016.

**[6]** The defendant had replied to the plaintiff's letter vide letter dated 7 December 2016 and states that:

(a) the defendant believes that in providing service to the public, the plaintiff has always ensured that their duty was observed in accordance with the

law, but in ensuring tax compliance amongst the taxpayers, the defendant is under a duty to conduct audit to ensure that the tax assessment made is in accordance with the provision of the Income Tax Act 1967;

(b) the defendant took the stand that sub-s 142(5) of the ITA overrides the provisions of Chapter IX of Part III, Evidence Act 1950 and the Legal Profession Act 1976. In other words, the audit conducted by the defendant did not breached the principle of solicitor-client's privilege;

(c) the defendant's stand is based on the followings:

(i) basic legal provision regarding the solicitor-client's privilege had been provided under s 126, Chapter IX, Part III of the Evidence Act;

(ii) however, the provision of sub-s 142(5) and (5)(b) of the ITA in specific overrides provisions of Evidence Act and the Legal Profession Act;

(iii) in addition, it is pertinent to stress that the defendant's officers are statutorily empowered under sub-s 80(1) to have full and free access to all lands, buildings and places to all books, documents etc; and

(iv) therefore, the failure of the lawyers or their clients in giving access of the documents to the audit officers are in breach of the ITA 1967 and can be prosecuted under para 116(a) of the ITA 1967.

THE ISSUES

**[7]** The plaintiff in this case had relied on s 126 of the Evidence Act 1950 ('the EA 1950') which generally provides for the evidentiary provision of the legal privilege principle whilst the defendant argues that s 142(5) of the Income Tax Act 1967 ('the ITA 1967') which specifically provides for law firm's client's account was not protected by privilege by its overriding effect over s 126 of the EA 1950. Amidst all this, the question of law for the determination of this court is whether s 142(5) of the ITA 1967 prevails over s 126 of the Evidence Act 1950 as there is conflict between both provisions.

**[8]** If the answer is in the affirmative, then the defendant is entitled to be given access to, or disclosure to the plaintiff's member's ('the law firm') client's account for the purpose of tax audit/investigation.

**[9]** After hearing the oral submissions from the plaintiff's counsel and the senior revenue counsel ('SRC') for the defendant and also referred to their written submissions and the authorities cited therein, the answer to the above issue which is the opinion of this court is stated in the following paragraphs of this judgment.

*Whether s 142(5) of the Income Tax Act overrides s 126 of Evidence Act 1950*

**[10]** I have considered the defendant's positon especially the submission that sub-s 142(5)(b) of the ITA has made it clear that its overriding effect extended to the operation of s 126 of the EA 1950. The term 'save as provided in para (b)' in sub-s 142(5)(a) of the ITA 1967 connotes that the operation of s 126 of the EA 1950 which was part of Chapter IX of Part III of the EA 1950 is *subjected to* and *has been ousted* by the operation of sub-s 142(5)(b) of ITA 1967. When s 142(5) of the ITA containing the said clause refers to any particular provision which it intends to override, inter alia, s 126 of the EA 1950, it is permissible to hold that it excludes the whole application of the s 126 of the EA 1950.

**[11]** I do not agree that s 142(5)(b) of the ITA 1967 goes beyond the provision of s 126 of the EA 1950. The argument is misconceived.

**[12]** Section 126 of the Evidence Act 1950 ('the EA') lies within Chapter IX Part III of the EA which provides that:

> (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> (2) Provided that nothing in this section shall protect from disclosure —
>
> (a) Any such communication made in furtherance of any illegal purpose;
>
> (b) Any fact observed by any advocate in the course of his employment as such showing that any crime of fraud has been committed since the commencement of his employment
>
> (3) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

*'Save as provided' in s 142(5)(b) of the ITA 1967*

**[13]** Firstly, s 142(5)(b) of the ITA 1967 says:

> Save as provided in paragraph (b) nothing in this Act shall —
>
> (i) affect the operation of Chapter IX of Part Ill of the Evidence Act 1950 (Act 56); or
>
> (ii) be construed as requiring or permitting any person to produce or give to a court, the Special Commissioners, the Special Commissioners, the Director General or any other person any document, thing or information

A on which bv that Chapter or those provisions he would not be required or permitted to produce or give to a court.

(iii) Notwithstanding the provisions of any other written law, *where any document, thing, matter, information, communications or advice consists wholly or partly of , or relates wholly or partly to, the receipts, payments, income, expenditure, or financial transactions or dealings of any person (whether an advocate and solicitor, his client, or any other person), it shall not be privileged from disclosure to a court, the Special Commissioners, the Director General or any authorized officer if it is contained in, or comprises the whole or part of, any book, account, statement, or other record prepared or kept by any practitioner or firm of practitioners in connection with any client or clients of the practitioner of firm of practitioners or any other person.*

**[14]** My reading of the above provision is that *only para (b)* of s 142(5) of the ITA 1967 excludes or overrides privilege conferred in other written law. The Act does not affect the operation of *Chapter IX of Part Ill of the Evidence Act 1950 (Act 56); or be construed as requiring or permitting any person to produce or give to a court, the Special Commissioners, the Director General or any other person any document, thing or information on which bv that Chapter or those provisions he would not be required or permitted to produce or give to a court.*

**[15]** Paragraph (b) of s 142(5) which was inserted vide the amendment made in Income Tax (Amendment) Act 1974 commence with the words 'Notwithstanding the provisions of any other written law'. Therefore, my view is as far as *other written law* which prohibit the disclosing or producing any document, thing or information to a court, the special commissioners, the special commissioners, the director general, such protection or privilege does not apply. Paragraph (b) overrides that Chapter or those provisions in that *written law*. Paragraph (b) saves Chapter *IX of Part III of the Evidence Act 1950* from operation of the ITA 1967. In other words, s 126 of the Evidence Act 1950 ('the EA') which lies within Chapter IX Part III of EA is saved and not caught under s 142(5) of the ITA 1967. Section 126 of the EA shall prevail over s 142(5) of the ITA 1967 but of course the proviso in s 126 does not protect privilege to disclose or produce any document, thing or information to communication made in furtherance of any illegal purpose and for showing that any crime of fraud has been committed by the advocate.

**[16]** The wordings of s 142(5) of ITA 1967 is clear and unambiguous and it should not be misinterpreted or assigned with another meaning. This has been decided by Federal Court in *Positive Vision Labuan Ltd v Ketua Pengarah Hasil Dalam Negeri and other appeals* [2017] 2 MLJ 421:

> The wordings of s 3B of the ITA and ss 3A and 2(3) of the LABATA as well as the Exemption Order are clear and unambiguous. *It is trite that when the provisions of law are clear and does not admit of any ambiguity, then the provisions must be strictly*

*interpreted*. This court in the case of *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94 had held:

> The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. Prima facie, *every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant*. It must be borne in mind that:
>
> > Its a general rule a Court will adopt that construction of a *statute which will give some effect to all of the words which it contains*. Per Gibbs J in *Beckwith v R* [1976] 12 ALR 333, at p 337.

**[17]** I inclined to agree with the plaintiff's submission that the defendant has clearly failed to appreciate that the ancient rules of privilege were framed to protect clients' confidentiality and thus it should not be treated in such a cavalier fashion as the defendant had submitted before this court. The defendant has clearly confused themselves as they have failed to understand privilege and also failed to address it.

**[18]** I agree with the plaintiff that the defendant has wholly misconstrued the applicability of non-obstante clause in the instant case. The correct operation of a non-obstante clause has been explained by the recent Federal Court in the case of *Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener)* [2015] 4 MLJ 166 where Zulkefli CJ held:

> [39] Although s 40(1) of the Act begins with the words *'notwithstanding ...'. it is a general principle that a non-obstante clause cannot go outside the limits of the Act itself.* We are in agreement with the contention of the plaintiff that *non-obstante clause is subject to the limitations contained in the section and cannot be read as excluding the whole Act and standing by itself.* ...

**[19]** Further, in *Smt Geeta And Ors vs The State Of UP And Anr* 2010 SC 1218, the Indian Supreme Court cited a few earlier Supreme Court cases, including *AG Varadarajulu & Anr vs The State Of Tamil Nadu & Ors* (1998) 4 SCC 231 (which has been cited with approval by *Ho Tack Sien*), to emphasise the importance of ascertaining the legislature's intention in interpreting non-obstante clauses (at p 288 of PBA4):

> 38. This court also held in the case of *ICICI Bank Ltd v SIDCO Leathers Ltd & Ors*, reported in (2006) 10 SCC 452, that *the wide amplitude of a non-obstante clause must be kept confined to the legislative policy and it can be given effect to, to the extent the Parliament intended and not beyond the same and that in construing the provisions of a non-obstante clause, it was necessarv to determine the purpose and object for which it was enacted* (See page 465–6).

A 39. In *Central Bank of India v State of Kerala & Ors*, reported in (2009) 4 SCC 94, this Court reiterated that while *interpreting a non-obstante clause the court is required to find out the extent to which the legislature intended to give it an overriding effect.*

B **[20]** Accordingly, care has to be exercised in construing the non-obstante nature of s 142(5) of the ITA to give effect to the intention of the Parliament and not beyond the purpose and object for which s 142(5) of the ITA is enacted.

C **[21]** Whilst s 142(5)(b) of the ITA was enacted by the Parliament to 'enable disclosure of information contained in records to be required and to be made and prevents privilege from being claimed in respect of such information, notwithstanding any other written law to the contrary' according to the explanatory statement, my view is that s 142(5)(b) of the ITA, at most, only has D the effect of removing privilege in respect of any book, account, statement or other record prepared or kept by 'practitioners' such as tax accountants and tax agents with a view to taxing the their clients and it does not extend to 'advocates and solicitors'. I agree with the plaintiff that this is because it is clear from s 142(5)(b) of the ITA itself that Parliament had used two different terms, E namely 'practitioner' and 'advocate and solicitor'.

**[22]** It is axiomatic that *when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here. used repeatedly.* This leads to the view that in the Ordinance there is a distinction F between the jurisdiction of a court and its powers (see the judgment of Thomson CJ in *Lee Lee Cheng (F) v Seow Peng Kwang* [1960] 1 MLJ 1. *It is a principle of statutory interpretation that when the Legislature uses different language in the same connection, in different parts of the statute, it is presumed that a different meaning and effect is intended and if different language is used in* G *contiguous provisions. it must be presumed to have done so designedly* (see *NS Bindrai's Interpretation of Statutes* (8th Ed) at p 275) (see His Lordship Arifin Zakaria FCJ in the recent Federal Court case of *Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21).

H **[23]** Accordingly, in s 142(5)(b) of the ITA, Parliament had clearly used different words as it recognised that 'practitioner' and 'advocate and solicitor' are different persons and it is trite that Parliament does not act in vain and significance must be given to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and I must not be disregarded — *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ord* [1985] 2 MLJ 35.

**[24]** I further agree with the plaintiff that the terms 'practitioner' and 'advocate and solicitor' in s 142(5)(b) of the ITA are meant to refer to different

persons, especially in light of the numerous times the term 'advocate' has been used throughout the statute. The meaning of 'practitioner' and 'advocate and solicitor' must be consistent throughout the ITA as a statute must be read as a whole — *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 MLJ 513.

**[25]** The intention of the Parliament and the object and purpose of s 142(5)(b) of the ITA has been thoroughly explained in the plaintiff's written submission as follows:

(a) the deliberate and conspicuous dropping of the word 'legal' preceding 'practitioner';

(b) in reading the ITA as a whole, the word 'practitioner' only appears in s 142(5)(b) of the ITA whereas the word 'advocate' appears six times and is clearly intended to refer to an advocate and solicitor — s 3 of the Interpretation Acts 1948 and 1967;

(c) the LPA uses 'legal practitioner' throughout the Act;

(d) s 142(5)(b) of the ITA contains a reference to 'advocate and solicitor' and a reference to a 'practitioner'. As Parliament does nothing in vain, two different phrases must convey two different meanings — *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35, *Funk David Paul v Asia General Asset Bhd* [2014] 1 MLJ 681, *Gurbachan Singh v Public Prosecutor* [1967] 2 MLJ 220 and *Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2007] 6 MLJ 581;

(e) 'advocate and solicitor' is a technical phrase and it is not to be supposed that Parliament uses the phrase in any other sense — *Mohindar Singh and another v Rex* [1950] 1 MLJ 97, *DP Vijandran v Majlis Peguam* [1995] 3 MLJ 576, *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97; [2006] 5 AMR 585 and *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707;

(f) the terms 'contained in records' of the explanatory statement demonstrate that s 142(5) of the ITA does not enable the disclosure of privileged communications per se, ie any documents pertaining to client communications found in the possession of solicitors to the defendant; and

(g) the phrase 'notwithstanding the provisions of any other written law' in s 142(5)(b) of the ITA does not eliminate the operation of common law.

**[26]** Therefore, s 142(5)(b) of the ITA cannot be used by the defendant as an excuse to be given access to the clients' account with a view to taxing the advocates and solicitors.

A *The common law on privilege*

**[27]** I am also of the view that the words 'notwithstanding the provisions of any other written law' in s 142(5)(b) of the ITA does not exclude the operation of common law.

B

**[28]** In *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257, the Federal Court discussed art 160(2) of the Federal Constitution which recognises that common law is different from that of written law (at p 307 of PBA4):

C

> The Court of Appeal correctly referred to the definition of 'law' in art 160(2). It reads as follows:
>
> > *Law includes written law, the common law* in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

D

**[29]** It is trite that in enacting a statute, the Parliament may elect to exclude common law. The High Court of Australia held in the case of *Blunden v Commonwealth of Australia* [2003] HCA 73 that:

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> For the purposes of s 80 of the Judiciary Act the words 'laws of the Commonwealth' related only to statute law and *did not include common law.*

F

**[30]** Section 142(5) of the ITA makes no reference to common law and the plaintiff therefore, such an exception should not be read into the statute. This has been confirmed in *Yeo Hock Cheng v Rex* [1938] 1 MLJ 104 where the court confirmed the pronouncement in the case of *Arthur v Bokesham* 11 Mod 150 that:

G

> The general rule in exposition of all Acts of Parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive *such a construction as may be agreeable to the rules of common law in cases of that nature: for statutes are not presumed to make any alteration in the common law. further or otherwise than the Act does expressly declare.*

H

**[31]** The Supreme Court in *Manilal & Sons (M) Sdn Bhd v M Majumder* [1988] 2 MLJ 305 cited *Walsh v Alexander* [1913] 16 CLR 293 with approval:

I

> ... that where rights and liabilities are not created by a statute, but arise by common law, then, even though they are affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed by common law, yet, *unless the statute expressly or by necessary implication excludes the common law remedy, the latter still remains.*

**[32]** This is fortified by the judgment of New Zealand Court of Appeal in

*Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191:

> And where an affirmative statute is open to two constructions, that construction ought to be preferred which is consonant with the common law.

**[33]** Applying the above authorities, I agree with the plaintiff that Parliament does not intend to apply s 142(5)(b) of the ITA to the exclusion of the common law on privilege and that s 142(5)(b) of the ITA cannot be given effect to the extent beyond the Parliament's intention! At most, s 142(5)(b) of the ITA may only apply to the possible secondary cases.

*Section 126 of the EA is the specific provision*

**[34]** I also agree with the plaintiff that the defendant has also misunderstood and misapplied the Latin maxim of *generalia specialibus non derogant* in this case. Based on the clear and express language in s 126 of the EA, it cannot be disputed that the EA is the specific statute which governs matters pertaining to privilege. Although s 126 of the EA was enacted before s 142(5) of the ITA, it is a specific provision on privilege, and as such excludes the operation of the general provision of s 142(5) of the ITA to the extent of any inconsistency (see *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600 and *Bennion on Statutory Interpretation (6th Ed).*

**[35]** The plaintiff has submitted numerous authorities on the subject matter of privilege. The defendant cannot ignore the superior and apex courts' judgments that privilege is absolute and it remains so until waived by the privilege holder.

**[36]** In the very recent case of *Gideon Tan v Tey Por Yee and another appeal* [2017] 1 MLJ 352 decided by the Court of Appeal and Federal Court, a lawyer sought to rely on privileged information to defend himself in a committal proceeding. In rejecting the same, the Court of Appeal and Federal Court once again *affirmed that privilege affords protection to clients only and not to lawyers*.

**[37]** Further, the Federal Court in *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 MLJ 14 held that ss 126–129 of the EA embody the common law position and expressly held that *'Legal professional privilege under s 126 of the Act is absolute and it remains so until waived by the privilege holder ie the client'*. This goes to show that *privilege is grounded and inherent in common law* and s 142 of the ITA simply cannot take away such fundamental principles.

**[38]** In *Malaysian Newsprint Industries Sdn Bhd v Bechtel International Inc & Anor* [2013] MLJU 866; [2014] 3 CLJ 367 the court has held that:

> The solicitor-client *privilege is absolute and permits* of only one exception which is waiver: (a) upon the express consent of the client given and directed to the advocate; and (b) such consent must be intentional and deliberate.
>
> ...
>
> *The law is very clear that this privilege is absolute and permits of onlv one exception which is upon the express consent of the client given and directed to the advocate and which consent must be intentional and deliberate. The common law maxim 'once privileged, always privileged' as embodied in ss 126–129 of the Evidence Act 1950 must be recognized.*

(See also *Protasco Bhd v PT Anglo Slavic Utama & Ors* [2016] 7 MLJ 523).

**[39]** As submitted by the plaintiff, s 126 of the EA embodies every privileged communication, including the client communications. The terminology of 'in the course and for the purpose of (an advocate's) employment' is repeated numerous times throughout s 126 of the EA. However, s 142(5)(b) of the ITA merely makes reference to the term 'in connection with any client'. The terminology of 'in connection with' is far from specific and is extremely general as to its meaning as well as its applicability.

**[40]** As such, the EA is undeniably more precise, unambiguous and specific. With those circumstances in mind, it is my considered opinion that s 126 of the EA must take precedence over s 142(5)(b) of the ITA to the extent of any inconsistency in respect of matters relating to privilege.

**[41]** It is to be noted that the defendant in fact has admitted that the ITA is a general legislation by citing the following passage from the case of *Ketua Pengarah Hasil Dalam Negeri v Malaysian Bar* [2006] 5 CLJ 217:

> [3] Section 80(13) of the LPA stipulates that the Malaysian Bar be exempted from tax on the compensation fund. The said provision is constituted under art 96 of the Federal Constitution which provides 'No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law'. *The LPA is a specific legislation whilst the ITA is a general legislation. Where there is a conflict between the LPA and ITA provisions, the LPA prevails ...*'.

**[42]** I would agree with the plaintiff that the fact that the Parliament would have had in mind the earlier (although not general) Act (the EA) when it enacted the later Act (the ITA) and intentionally chose a different terminology, ie 'practitioner' as opposed to 'advocate', is evident of the Parliament's intention that s 142(5)(b) of the ITA is not to be applied to advocates and solicitors. Otherwise, the Parliament would have used the same terminology in the ITA having in mind the EA.

*Basis for looking into the client's accounts*

**[43]** The defendant has stressed that the defendant is clear with its objective in requesting for a view to the law firm's client's account which is to ensure that the law firm itself do not understate its income and therefore, an audit on the full documents held by the applicant is necessary which also includes the 'client's account'. The plaintiff has a duty to regulate LPA which includes providing for the keeping by advocates and solicitors at banks for client's money pursuant to *s 78 of the LPA*. In furtherance to that, r 2 of the Solicitors' Account Rules 1990 ('the SAR') provides that a 'client account' means 'a current or deposit account at a bank *in the name of the solicitor* in the title of which the word 'client' appears.

**[44]** Based on the same provision it can be concluded and it is also never disputed that the plaintiff's members (law firms) had full access to maintain the client's account. Therefore, the client's account is never fully protected from misuse by the law firms and this is supported by myriads of cases where law firms had misuse client's account which also includes circumstances whereby the client's account was use to hold transfers which was done fraudulently by law firms.

**[45]** Defendant submitted that this illegal conduct is not foreign in other developing countries. In fact, few attempts had been done by local authorities in other developing country to curb the matter. Relying on the same basis, the defendant finds it important to ensure that the plaintiff did not use the client's account as a means to park the law firm's own incomes which will then result to an understatement of income by the respective law firm. The decision to look into the respective law firm's client's account was not done arbitrarily but in fact in accordance with the law. Had the law did not provide for the same, the defendant would not have decided to look into the plaintiff's member's client's accounts.

**[46]** In essence, what the defendant is trying to say is that although as contended by the plaintiff, 'client's account' does not hold monies of lawyers but it is rather a subjective matter open to challenge. This is because, few cases cited had proven that 'client's account' had been misused by law firms as the account was actually made in the name of the solicitor itself. This shows multiple possibilities of misuse of 'client's account' for law firm's income.

**[47]** The plaintiff in reply submitted that the equitable doctrine that an Act of Parliament (in this case, the ITA) shall not be used as an instrument of fraud has long been recognised and applied in numerous English and Malaysian cases (see *British Railways Board v Pickin* [1974] AC 765 (HL) and *Koh Siew Keng (P) & Anor v Koh Heng Jin* [2008] 3 MLJ 822 (CA)). In the instant case, it was

A the plaintiff's contention that the defendant have sought to use the ITA as an instrument of fraud purportedly to fish for information on the clients of the law firms.

B **[48]** Further, the audits carried out by the defendant on the law firms and the documents related to client communications are in the guise of a fishing expedition to unlawfully fish for information on the clients of the law firms. Such unmeritorious conduct of the defendant in seeking to use s 142(5) of the ITA as an engine of fraud is abusive, unlawful and illegal.

C **[49]** In the case of *SR Batliboi and Co v Department of Income Tax (investigation)* LNIND 2009 DEL 689, the High Court of India held:

> It appears plain to us, therefore, that for a search or seizure to be legal it should not be firstly ordered for mala fide, extraneous or for oblique reasons. Secondly, it must
D be predicated on information received by the Authority who would have reason to believe that it is necessary to conduct such an operation. *Thirdly, it should not be in the nature of a roving or fishing exercise.* These three factors must be observed rigorously and even punctiliously since the exercise of such powers invariably result in a *serious invasion of the privacy and freedom of the citizen* ...
>
E *It is also our view that the Income Tax Department cannot make fishing or roving inquiry to initiate proceedings against all these companies which are the clients of the Petitioner.*

F **[50]** The plaintiff contended that the defendant failed to comprehend that, by looking into the clients' accounts of the law firms in the process of auditing the law firms, the defendant could never be able to ascertain the income of the law firms, as the clients' accounts do not in any way constitute part of the income of the law firms — *Choong Yik Son v Majlis Peguam Malaysia* [2008]
G 7 MLJ 215. It is also held that any advocate and solicitor caught meddling with the client's account must face the wrath of the law.

**[51]** Applying the above authorities, the plaintiff submitted that the contention by the defendant is merely an excuse for the defendant to
H unlawfully fish for information from the clients of the law firms. The defendant's contention which is based on presumption does not hold water and is bound to fail.

I **[52]** My observation is that while the defendant may have its own purpose and objective, however, any action done must be in accordance with the law. It is understood that the defendant relied on s 142(5) of the ITA to view the 'client's account'. But while I agree that para (b) of s 142(5) does not protect privilege communication or documents in other written law, the fact remains that solicitor–clients privilege under s 126 of the Evidence Act 1950 ('the EA')

which lies within Chapter IX Part III of the EA is not affected by the operation of the ITA 1967.

**[53]** Be that as it may, s 126 of the EA does not protect the privilege in the following circumstances:

(a) any such communication made in furtherance of any illegal purpose; and

(b) any fact observed by any advocate in the course of his employment as such showing that any crime of fraud has been committed since the commencement of his employment

**[54]** It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

**[55]** *In my considered opinion, before the defendant is required to view the 'client's account' there must some information of an illegal act/purpose and/or any crime of fraud or reasonable belief that the plaintiff has used the client's account as a means to park the law firm's own incomes which resulted to an understatement of income by the respective law firm which warrant an investigation*.

CONCLUSION

**[56]** In conclusion, the summary of my decision are follows:

(a) privilege is absolute unless it is waived by the privilege holder or falls within the proviso to s 126 of the EA and it therefore affords protection to clients and not to lawyers;

(b) it is not open for the defendant to have any access to the clients' account with a view to checking whether the law firms have understated their income without having any reasonable suspicion of any misconduct or criminal conduct on the part of the law firms;

(c) the defendant cannot be allowed to use the ITA as an instrument of fraud purportedly to fish for information on the clients of the law firms;

(d) the non-obstante nature of s 142(5)(b) of the ITA ought to be read in accordance with the actual words of Parliament;

(e) s 142(5)(b) of the ITA, at most, only has the effect of removing privilege in respect of any book, account, statement or other record prepared or kept by 'practitioners' such as tax accountants and tax agents with a view to taxing their clients and it does not extend to 'advocates and solicitors';

(f) in s 142(5)(b) of the ITA, Parliament had clearly used different words as it recognised that 'practitioner' and 'advocate and solicitor' are different persons;

A (g) s 142(5)(b) of the ITA does not oust the common law on privilege; and

(h) based on the clear and express language in s 126 of the EA, it cannot be disputed that s 126 of the EA is the specific provision which governs matters pertaining to privilege. The defendant has misunderstood and misapplied the Latin maxim of *generalia specialibus non derogant.*

B

**[57]** In the result, the answer to the issue is in the negative. I allowed the plaintiff's application in the originating summon with cost of RM5,000.

C *Plaintiff's application allowed with costs of RM5,000.*

Reported by Ahmad Ismail Illman Mohd Razali

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